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**Before the
Surface Transportation Board**

**SURFACE
TRANSPORTATION BOARD**

Finance Docket No. 34933

FILED

SEP 22 2006

**UTAH TRANSIT AUTHORITY --
ACQUISITION AND LEASE EXEMPTION --
UNION PACIFIC RAILROAD COMPANY
IN SALT LAKE COUNTY, UTAH**



**SURFACE
TRANSPORTATION BOARD**

**MOTION OF
UTAH TRANSIT AUTHORITY
TO DISMISS THE NOTICE OF EXEMPTION**

**ENTERED
Office of Proceedings**

SEP 22 2006

Part of
Public Record

The Utah Transit Authority ("UTA"), a public transit district organized under Title 17A, Chapter 2, Part 10, Utah Code Annotated 1953, as amended, hereby moves this Board for dismissal of a Verified Notice of Exemption ("NOE") filed today in this proceeding. Because UTA has not acquired either rights or obligations that implicate in any way the freight common carrier operations that remain attached to the property covered by the NOE and thus has not become a rail carrier providing transportation subject to the jurisdiction of the Board, UTA hereby respectfully requests the Board to dismiss the NOE.

I. FACTS

UTA will purchase from the Union Pacific Railroad Company ("UPRR") the remaining width of a portion of the Bingham Industrial Lead, a line of railroad main track corridor (formerly The Denver and Rio Grande Western Railroad Company) as said line extends in a westerly direction from Midvale, Utah, M.P. 0.00 of said line, to Bagley, M.P. 6.60 of said line shown on Exhibit 1 to the NOE, of which right-of-way UTA acquired a thirty-five foot (35')

strip from UPRR as part of the transaction described in STB F.D. No. 34170, *Utah Transit Auth. – Acquisition Exemption – Certain Assets of Union Pacific R. Co.*¹

On the Bingham Industrial Lead, UPRR is retaining an easement that provides it with the exclusive right to provide freight service over the Bingham Industrial Lead, subject to pre-existing rights of BNSF Railway Company (“BNSF”), which will remain unaffected by this transaction. UPRR intends to subsequently transfer its freight operating rights to Salt Lake City Railroad Company, Inc. (“SL”), which would thereafter fulfill the remaining common carrier freight obligations relating to the line. SL will separately seek any required authorization from this Board for its acquisition of the right to provide freight service on the line. UTA has acquired no right to operate freight service on the line and will acquire none. The agreements describing the purchase of the Bingham Industrial Lead, and the coordination of the freight and passenger operations that will occur on that line are attached to the NOE as Exhibits 2 and 3, respectively.

The operative agreements confirm that UTA will acquire neither the right nor the obligation to provide freight service on the Bingham Industrial Lead. The Eighth Amendment to Purchase and Sale Agreement, attached to the NOE as Exhibit 2 (“NOE Exh. 2”) specifically provides that UPRR will retain an exclusive easement for the purpose of fulfilling its rights as common carrier freight railroad. NOE Exh. 2 at 3, §1(b)(i). In addition, the agreement also provides that UPRR has the right to transfer its freight obligations to SL after the closing on UTA’s acquisition of the Bingham Industrial Lead. *Id.* at 3, §1(b)(ii).

¹ In a decision in F.D. No. 34170 served on May 22, 2002, this Board dismissed the Notice of Exemption that UTA had previously filed with respect to the transaction that included the Bingham Industrial Lead. The Board concluded that “no common carrier rights or obligations are being transferred and UTA will not hold itself out to be a common carrier performing rail service”, and that UP’s ability to fulfill its retained common carrier freight obligation on the line would not be impaired by the rights and obligations UTA acquired in that transaction. F.D. No. 34170, Decision, *slip op.*, at 4.

The draft Administration and Coordination Agreement (the “ACA”), attached to the NOE as Exhibit 3 (“NOE Exh.3”) confirms that once any transfer to SL is effective, SL as transferee of UPRR’s freight common carrier easement will acquire, the “exclusive right and obligation to provide Freight Rail Service” on the Bingham Industrial Lead. NOE Exh. 3 at 6, §2.1. This agreement allocates to UTA the exclusive right to conduct passenger service on that right of way. *Id.* at 6, §2.2. UTA has the right, upon thirty days notice to SLSCR to change usage of tracks, but not in a way that interferes with SL’s ability to provide freight service. *Id.* at 6, §2.3. UTA may also construct additional track or track improvements, but that construction may not interfere with SL’s ability to conduct freight operations. *Id.* at 9, §4.2.

The trackage is divided into three categories: exclusively passenger track, exclusively freight track, and joint track. The ACA establishes UTA’s exclusive right to operate and manage the operation on the passenger track (*id.* at 11, §5.1), and SL’s exclusive right and obligation to control operations on the freight-only track (*id.* at 12, §5.2). Usage of the joint trackage is divided into an exclusive freight period between the hours of 12:00 midnight and 5:00 a.m. Monday through Friday, and an exclusive passenger period between 5:01 a.m. and 11:59 p.m. Monday through Friday and all day Saturday and Sunday. *Id.* at 12,, §5.4. When SL is operating on the joint trackage, that railroad will have the authority and obligation to manage and control all aspects of the freight operation. *Id.* at 14, §5.6.

II. UTA HAS NOT ACQUIRED RIGHTS AND OBLIGATIONS THAT WOULD CONSTITUTE ASSUMPTION OF A COMMON CARRIER OBLIGATION, AND THE NOTICE OF EXEMPTION SHOULD BE DISMISSED.

The transaction documents confirm that UTA is acquiring none of the rights and obligations that are essential to provide freight service on the line, and that either UPRR or its putative transferee the SL has or will have the sole right to provide that service. UPRR intends

to transfer those rights to SL after UPRR transfers ownership of the lines to UTA. The Notice of Exemption should be dismissed because the transaction does not involve the transfer of any rights that would implicate this Board's jurisdiction.

This Board, like the ICC before it, has continued to rule that it need not assert jurisdiction over a transaction involving a line of railroad when the buyer has no intention or ability to assume freight operation and is not acquiring assets or rights that would "disenable ... [the seller] from meeting its common carrier obligation." *State of Maine, DOT – Acquisition and Operation Exemption – Maine Central R. Co.*, 8 I.C.C. 2d 835 (1991). Citing *State of Maine*, this Board has reiterated that "[o]ur authorization is not required, however, when only the physical assets will be conveyed and the common carrier rights and obligations that attach to the line will not be transferred." STB F.D. No. 34170, *Utah Transit Authority – Acquisition Exemption – Certain Assets of Union Pacific R. Co., slip op.*, Service Date May 22, 2002 ("*UTA Acquisition*").

More recently, the Board reviewed a transaction between Metro North Commuter Railroad Company and the Norfolk Southern Corporation. STB F. D. No. 34293, *Metro-North Commuter R. Co. – Acquisition and Operation Exemption – Line of Norfolk Southern Ry. Co. and Pennsylvania Lines LLC, slip op.*, 2003 STB Lexis 245 (Service Date May 13, 2003). There, following the transaction, Metro North had responsibility for dispatching, maintenance, and constructing capital improvements, but Norfolk Southern would continue to be fully and solely responsible for fulfilling its obligations as a freight common carrier. *Id.* at *5-*6. The Board concluded that Norfolk Southern was "not transferring common carrier rights or obligations and that Metro-North will not hold itself out as a common carrier performing rail freight service.... As such, Metro-North will not become a rail carrier subject to ... [the Board's]

jurisdiction as a result of the transaction.” *Id.* at *7. *Accord*, STB F. D. No. 33046, *Sacramento-Placerville Trans. Corridor J.P.A. – Acquisition Exemption – Certain Assets of Southern Pacific Trans. Co.*, 1996 STB Lexis 275 (Service Date October 28, 1996); STB F. D. Nos. 32374 and 32375, *Los Angeles Co. Trans. Comm’n – Petition for Exemption – Acquisition from Union Pacific R. Co.*; *Los Angeles Co. Trans. Comm’n – Trackage Rights Exemption – Union Pacific R. Co.*, 1996 STB Lexis 205 (Service Date July 23, 1996).

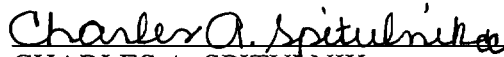
The Board should conclude that this transaction, like the transactions described in *Metro-North*, *UTA Acquisition*, *Sacramento – Placerville*, and *Los Angeles Co. Trans. Comm.*, does not involve the transfer of common carrier obligations. Following this transaction, UPRR and then its transferee SL will continue to hold the obligation to provide freight common carrier service. UTA has specifically acquired no rights that would permit it to engage in such operation. There is nothing here to trigger jurisdiction because UTA will be acquiring no control over the freight operations on the line. UTA will provide, or arrange for the provision of, passenger service, but will not hold itself out as a freight carrier and will have no freight service responsibilities. UTA may not change any aspect or feature of any of the tracks used for freight operations without securing the concurrence of SL and without ensuring that the change does not prevent SL from fulfilling its freight common carrier obligations.

Consistent with prior Board rulings where an agency is acquiring sufficient interests to permit it to conduct and implement commuter transit operations, but insufficient interests to allow it to conduct freight operations on its own or to impede the freight railroad’s ability to fulfill its common carrier obligations, the Board should conclude that it need not assert jurisdiction over the two transactions. Accordingly, the Motion to Dismiss should be granted.

WHEREFORE, and in view of all of the foregoing, UTA respectfully requests the Board to dismiss the Notice of Exemption in this proceeding.

Dated: September 22, 2006

Respectfully submitted,



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